

services as substitutes for local telephone service. For this reason, the apparent congressional purpose in affording special treatment to rural telcos can be achieved by providing them preferences only for licenses in their service areas, whereas the preferences for minorities, women and small businesses have an obvious applicability without regard to geographic restrictions.

4. Preferences for Minority-Inclusive Consortia

The Commission proposes to make available to consortia which include minorities as participants the same investment incentives that would be available to individual minority business entities. NPRM at ¶¶ 78-79, 121. CIRI supports the Commission's proposal to apply preferences such as set-asides, installment payment plans, and tax certificates to transactions involving minority-inclusive consortia. Such a proposal will encourage non-minority firms to form partnerships and other ventures with minority firms for the provision of spectrum-based services. In turn, minority enterprises will enjoy greater access to capital and to larger markets than would otherwise be possible. However, as noted above with respect to eligibility requirements for a "minority" applicant, strict eligibility requirements (with respect to minority ownership and control of the consortium) should be applied to the minority-inclusive consortium if it is to be accorded minority preferences.

**III. THE COMMISSION MUST ADOPT ADEQUATE SAFEGUARDS
TO PREVENT UNJUST ENRICHMENT**

A. Safeguards: Financial/Payment Issues

1. Financial Information in Bidder Application

The Commission discusses a number of issues relating to assessing the financial bona fides of applicants for licenses to be awarded through competitive bidding. We address in this section proposals concerning the financial information which should be required of all bidders and the special payment procedures applicable to designated entities.

The Commission has requested comment on what information should be required in a bidder's application to demonstrate that the bidder has the financial resources to construct and operate a facility if a license is awarded. NPRM at ¶¶ 80, 98, 102, 128. The Commission has noted that it intends "to limit bidding to serious qualified bidders . . ." to promote the rapid deployment of new technology. NPRM at ¶ 102. Toward this end, CIRI believes that the Commission should deter potential speculation on PCS and other licenses by calling for the disclosure of qualification information that only a serious and qualified bidder can produce.

The Commission proposes to apply the financial qualifications standard employed in the RSA cellular lotteries. NPRM ¶ 128. Under this standard, "applicants

would be required to demonstrate that they have the available resources to meet the realistic and prudent estimated costs of constructing and operating their facilities for one year." Id. An RSA applicant may meet this standard by demonstrating either that it has the current financial resources to do so, or that it has a "firm financial commitment" from a "recognized financial institution" that will enable it to do so. 47 C.F.R. § 22.917(c).

Regardless of what financial qualification standard is adopted by the Commission, it must be strict enough to weed out those who are not serious and qualified bidders. Moreover, because financial qualification will be the sine qua non of an applicant's ability to ultimately provide its proposed spectrum-based service, each applicant -- including minorities and other designated entities -- must be required to make the same financial showing as all other applicants. As far as financial qualifications are concerned, the Commission must establish a level playing field. In this regard, the SBAC proposal to permit designated entities to "self-certify" their financial qualifications in their applications cannot be considered seriously. NPRM at ¶ 80 n.60. To permit a firm to warrant its financial resources on the basis of a letter from an investment banker plus its "internal funds" and "bank commitments" would be to invite the type of license speculation that will do nothing to

assist legitimate minority-owned businesses to participate more fully in the provision of spectrum-based services.

Unless the Commission requires bid applicants to demonstrate that they have examined seriously the costs of constructing and operating the licensed service, and are in a position to meet those costs, then firms with no real ability to offer spectrum-based services will either warehouse the frequencies or market licenses for profit. In addition to eliminating opportunities for serious qualified firms, this practice would delay the delivery of service to the public and would deny the public the benefits of competition.

2. Up-Front Payments and Deposits for Minority and Non-minority Bidders

The Commission has proposed a plan to require each potential bidder to tender a substantial up-front payment as a condition of entry to the auction. The payment would be calculated based on the amount of spectrum and population covered by the license sought. NPRM at ¶¶ 102-03.

Moreover, the Commission has proposed that before the high bidder in a given auction is declared the winner, the bidder must tender a nonrefundable deposit to the Commission. The Commission suggested that the difference between the up-front payment and 20 percent of the winning bid could be an appropriate measure for this deposit. NPRM at ¶ 107. Finally, the Commission proposed to keep any up-front

payments and deposits if an auction winner is later found to be ineligible, unqualified, or cannot pay a balance when due. In the alternative, the Commission proposed to bar such an applicant from any future auctions. NPRM at ¶ 109.

CIRI supports each of the Commission's proposals in this regard. CIRI believes that only serious and qualified bidders should participate in auctions for both set-aside and non-set-aside spectrum. The employment of an up-front payment in concert with a substantial deposit will help to deter unqualified bidders from entering those auctions. CIRI also favors the Commission's proposal to retain the up-front payment and deposit of any winning firm that is later found to be ineligible or unable to comply with the payment terms set by the Commission. In addition to keeping that deposit, the Commission should bar the applicant from participation in future FCC licensing proceedings, whether or not involving competitive bidding.

3. Payment Terms for Minority Bidders

The Commission has proposed two specialized payment plans for successful designated entities. The first is an installment payment plan under which a designated entity will pay the full balance of the winning bid over time with interest assessed during the term of the repayment. NPRM at ¶¶ 69, 79. As indicated above, CIRI supports this payment plan, but believes that the Commission should limit the rate of interest to the government's cost of money. Moreover,

CIRI believes that the rate of interest should be fixed for the duration of the indebtedness to facilitate administration and planning both by the Commission and by the designated entities.

The second payment plan proposed by the Commission entails the use of royalty payments to the government out of funds earned by the designated entity from the use of the license. NPRM at ¶ 80. CIRI opposes the use of royalty payments. As the Commission recognized (NPRM at ¶ 70), royalty payments would be both costly and intrusive to administer. Because there is no commodity "output" in this field, the Commission would have to establish and enforce an accounting standard to link income dollars to the portion of the license for which compensation is being paid. Moreover, the risk of any loss or default under such a system falls not on the operating entity, but on the United States. Obviously, the royalty payment plan is not consistent with the Commission's goal to develop an auction system that is "simple and easy to administer." NPRM at ¶ 18.

In sum, the Commission should make due allowance for designated entities by permitting them to make installment payments at reasonable interest rates. But it should eliminate opportunities for bidders who are neither serious nor qualified by adopting strict financial qualification requirements to be reflected in applicants' initial applications, requiring substantial up-front payments and

deposits and imposing significant penalties upon those who fail to satisfy any of the financial requirements.

B. Safeguards: Anti-Trafficking Provisions

The Budget Act directs the Commission to implement measures, such as antitrafficking restrictions and financial disincentives, designed to "prevent unjust enrichment [of those entities to whom licenses are awarded] as a result of the methods employed to issue licenses and permits." See NPRM at ¶ 83; 47 U.S.C. 309(j)(4)(E). The Commission agrees that unjust enrichment is a potential problem in auctions where participation is limited in order to ensure the participation of designated entities. NPRM at ¶¶ 83-84. Therefore, the Commission requests comment on the use of antitrafficking restrictions and on financial disincentives to curb such abuse. NPRM at ¶ 84.

The Commission does not favor the use of antitrafficking restrictions. It observes that "an outright prohibition on transfer, even for a limited time such as one year, may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously." NPRM at ¶ 84. Therefore, the Commission proposes instead to adopt a complex system of financial disincentives to discourage premature transfer of licenses. Id.

CIRI agrees that measures are necessary to ensure that those licensees who obtain a license through the award of a preference are not unjustly enriched by the immediate sale of that license. Such speculation in licenses destroys the integrity of and the purposes behind the preference system. However, contrary to the Commission's apparent conclusion, antitrafficking restrictions -- of limited but reasonable duration -- are the most effective and efficient means of preventing such abuse. CIRI therefore endorses a two-year prohibition on the sale of licenses obtained by means of a preference. However, in cases where the license is being transferred to a minority-owned entity, the purposes behind the preference system (i.e., increased minority participation in telecommunications) dictates that any trafficking prohibition should be waived.

The Commission's concern that such a holding period would result in the unreasonable delay of service to the public is not reflected in the Commission's use of such restrictions in other services. For example, in broadcast, licensees who obtain the license pursuant to the Commission's Minority Ownership Policy are restricted from transferring the license for one year after commencement of service "in order to protect the integrity of the policy." Amendment of Section 73.3597, 99 FCC 2d 971, 974 (1985). At the same time, the one-year requirement is waived for transfers "to a minority-owned or controlled entity in

furtherance of our Minority Ownership Policy." Id. See also 47 C.F.R. § 73.3597(a). The same policy applies to low-power television licensees who obtain the license by means of a minority preference, since a rapid transfer of licenses "would undermine the intent of the preference scheme." Random Selection Lotteries, 93 FCC 2d 952, 972-73 (1983); Low Power Television Service, 51 R.R.2d 476, 518 (1982); 47 C.F.R. § 73.3597(a).

Even in the Public Mobile Radio Service, where no minority preferences are awarded, the Commission has found it necessary in some instances to impose a one-to-three-year holding period as "a deterrent for insincere applicants to speculate in unbuilt or newly built facilities." Cellular Lottery Rulemaking, 98 FCC 2d 175, 217 (1984); Cellular Unserved Areas, 6 FCC Rcd 6185, 6223 (1991); Cellular Renewals, 7 FCC Rcd 719, 725 (1991); 47 C.F.R. §§ 22.40(b)(2), 22.40(c), 22.920(c). A three-year anti-trafficking restriction is also applied to cable licensees under the 1992 Cable Act, but is waived for sales to minority enterprises. See 47 C.F.R. § 76.502 (1993).

For the reasons the Commission has relied upon in those areas, CIRI supports an antitrafficking period of two years for licenses won with the use of designated entity preferences. A longer period is not necessary or beneficial for the same reasons discussed by the Commission when it reduced the broadcast antitrafficking period for

construction permits granted in comparative hearings or distress sales from three years to one year. As the Commission said, a longer period

prohibits a willing buyer ready to pay the market price from taking over the station, while forcing the seller to continue the operation of a facility it no longer desires or cannot support. The public stands to suffer reduced service from a failing operation, and will not in any case receive the improved service which a more willing operator or a new infusion of capital might provide.

Amendment of Section 73.3597, 52 R.R.2d 1081, 1082 (1982).

In the NPRM, the Commission proposed a system "of financial disincentives" in lieu of anti-trafficking provisions to prevent unjust enrichment from the "premature sale of a license" won at auction by a designated entity. NPRM at ¶ 84. However, explicit restrictions on the transfer of licenses obtained through preference would be far easier to implement than a system of financial disincentives where every figure used in the "penalty" formula will be contested by one party or another.

For example, requiring a payment that is "based on the estimated difference between the price paid at the auction and the price that would have been paid without the set-aside" (NPRM at ¶ 85) is an invitation to protracted litigation over the hypothetical price that "would have been paid." Likewise, even the Commission recognized that its proposal for a penalty in an amount "equal to a certain percentage of the difference between the initial bid price

and the transfer price" has the potential for significant controversy when applied to transactions that are not pure cash transactions. NPRM at ¶ 88. In an era when the Commission has expressed concern about its having the level of resources required to fulfill all of its congressionally-mandated responsibilities, imposing an easy-to-administer antitrafficking restriction on licenses obtained through preferences makes far more sense than attempting to administer a system of financial disincentives that will only result in more litigation for the Commission.

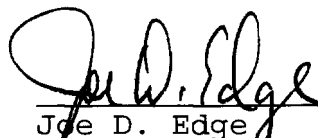
CONCLUSION

CIRI welcomes the opportunity to participate in this landmark rulemaking proceeding. As indicated in these Comments, CIRI believes that Congress' direction to the Commission is clear with respect to the mandate to establish a competitive bidding regime sensitive to minorities and others who have traditionally encountered barriers to entry into capital-intensive enterprises.

For the reasons stated above, CIRI urges the Commission to adopt proposals to afford minorities enhanced opportunities to participate in spectrum-based services while establishing strict eligibility requirements and other

safeguards to assure that the preferences mandated by Congress flow to Congress' intended beneficiaries.

Respectfully submitted,



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APPENDIX A

SOURCE MATERIALS DEMONSTRATING THE UNDERREPRESENTATION OF MINORITIES IN THE TELECOMMUNICATIONS INDUSTRY

**A Market Analysis of the Telecommunications Industry:
Opportunities for Minority Businesses**, U.S. Minority
Business Development Agency (August 20, 1991)

Describes business conditions and opportunities in various telecommunications sectors, including cellular, PCN, and paging. Finds that minority firms represent only 0.5% of all firms listed in the Standard Industrial Classification Codes relevant to this proceeding.

1987 Economic Census: Survey of Minority-Owned Business Enterprises, U.S. Bureau of the Census (August 1991)

Details minority involvement in communications industry and compares minority involvement with majority dominance of industry on variety of scales, including size of operations, receipts, location of operations. Finds that minorities account for only 7.8% of businesses operating in the field of communications.

Report of the FCC Small Business Advisory Committee to the FCC (September 15, 1993)

Describes current concentration of ownership in telecommunications with emphasis on racial and gender underrepresentation.

Minority Business Development and Equal Employment Opportunity in the Telecommunications Industry, Citizens' Commission on Civil Rights (1989)

Describes participation of minorities in telecommunications. Charts participation in terms of ownership share and employee percentages. Concludes that minority ownership policies should be applied to spectrum allocation proceedings.

Analysis and Compilation by State of Minority-Owned Commercial Broadcast Stations, Minority Telecommunications Development Program, NTIA (October 1993)

Charts minority (including Alaska Native) ownership and control of broadcast facilities.

Communications and Minority Enterprise in the 1990s, FCC & NTIA Conference Report (September 27, 1990)

Describes business conditions and opportunities for minority firms in various telecommunications sectors, including cellular, PCN, and paging.

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566 (1990)

"Congress found that 'the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.'" (Citing H.R. Conf.Rep. No. 97-765, p. 43 (1982), U.S. Code Cong. & Admin. News 1982, 2237, 2261, 2287).

Deregulation and Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform, 8 Comm/Ent L.J. 329, 426 n.516 (1986)

Describes the difficulties encountered by minority owners of broadcast stations, who often are able to obtain only the less valuable stations.

Minority Broadcasting Facts, National Association of Broadcasters (September 1986)

Finds that in 1986, minorities owned only 2.1% of all radio and television stations in the United States.

Final Report: Strategies for Advancing Minority Ownership Opportunities, Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (May 1982)

Describes the systemic obstacles to the entrance of minorities into the telecommunications industry.

Report on Minority Ownership in Broadcasting, FCC Minority
Ownership Task Force (1978)

Details the underrepresentation of minorities in the broadcasting industry, and discusses the unique financial and socioeconomic barriers encountered by minorities seeking to enter the industry.

Federal Civil Rights Enforcement Effort - 1974, 1 U.S.
Commission on Civil Rights, p.49 (November 1974)

Describes the underrepresentation of minorities in communications industries.